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UNITED NATIONS

AT

Administrative Tribunal

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AT/DEC/730
21 November 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 730

Case No. 795: SANCHEZ ORRICO

Against: The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Mikuin Leliel Balanda;

Whereas at the request of Antonio Sanchez Orrico, a former staff member of the United Nations Educational, Scientific and Cultural Organization, hereinafter referred to as UNESCO, and a participant of the United Nations Joint Staff Pension Fund, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 March 1994;

Whereas, on 15 March 1994, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 12 May 1994, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal:

> "44. Consequently, the Applicant respectfully requests the Tribunal:
>
> (a) To rescind the decision contained in the letter from the Secretary of the United Nations Joint Staff Pension Board dated 1 June 1992 (...) and confirmed by the Standing Committee at its 175th meeting held on 29-30 June 1993 (...) whereby the Secretary of the Pension Board determined the

initial amount in local currency of the Applicant's early retirement benefit by applying a reduction factor of 6 per cent per year to the initial pension in dollars to which the Applicant would have been entitled on 31 December 1990;

(b) To order that the initial local-currency amount of the Applicant's early retirement benefit be recalculated by applying a reduction factor of 2 per cent and 3 per cent a year to the initial pension in dollars to which the Applicant would have been entitled on 31 December 1990, as provided in article 29 (b) (i) of the Regulations of the Pension Fund;

(c) To order that the pension, thus recalculated, be paid with effect from 18 January 1991, taking into account the adjustments applicable since that date.

45. The Applicant has suffered considerable injury due to the fact that, since 18 January 1991, he has been receiving a pension substantially lower than it should have been. That injury can be remedied only by the payment of appropriate interest. The Applicant does not consider that article 44 of the Regulations of the Pension Fund can be invoked in this instance. That article provides that 'the Fund shall not be liable for interest on any due but unpaid benefits'. That provision can only apply to normal delays which inevitably occur in the initial payment of pension entitlements but not to a situation in which, because of a misapplication of the law, the Fund pays a lower pension than is due. This is particularly true where the anomaly, as in the present case, extends over several years. It was on those grounds that, in its Judgement No. 313 (Passetti Bombardella), the Tribunal granted the Applicant retroactive interest 'for the damage he suffered as a result of the abnormal delay in the payment of his benefit'.

46. For this reason, the Applicant respectfully requests the Tribunal to order the Respondent to pay him interest, at a rate to be determined by the Tribunal, on the sums representing the difference between the pension actually paid and the pension that is due under the judgement of the Tribunal.

47. The Applicant also requests the Tribunal to award him costs, to be determined by the Tribunal for expenses incurred by him in the preparation and presentation of this application."

Whereas the Respondent filed his answer on 31 March 1995;

Whereas the Applicant filed written observations on 2 October 1995;

Whereas the facts in the case are as follows:

The Applicant was a participant in the United Nations Joint Staff Pension Fund (the Fund) from 16 January 1966, when he entered the service of UNESCO, until he separated from service on 31 December 1990.

In a letter dated 28 February 1991, the Secretary of the UN Joint Staff Pension Board (UNJSPB) advised the Applicant of the amounts of his initial periodic benefit as calculated, both on the US dollar track and on the Spanish local currency track, based on the date of his separation, i.e. 31 December 1990. Subsequently, UNESCO revised the Applicant's date of separation to 18 January 1991. This resulted in the Applicant's having completed the 25 years of contributory service required for the application of the 2 and 3 per cent reduction factors established in article 29(b)(i) of the Fund's Regulations, instead of the 6 per cent reduction factor applicable to the original separation date. Consequently, the Applicant's initial monthly dollar pension rose from $1,316.61 to $1,596.46. His benefit on the local currency track, established on the basis of his residence in Spain, was not altered.

In a letter dated 6 April 1992, the Applicant questioned the initial calculation of his local currency pension benefit, referring to an estimate he had received from UNESCO in September 1990. On 1 June 1992, the Secretary of the UNJSPB sent the Applicant a revised benefit letter, reflecting the amended date of separation, 18 January 1991, detailing the calculations made to establish the Applicant's benefit in local currency.

On 29 July 1992, the Applicant wrote to the Secretary of the UNESCO Staff Pension Committee, questioning the method adopted by the Secretary of the UNJSPB to calculate the Applicant's pension

benefit. In a reply dated 28 August 1992, the Secretary of the UNESCO Staff Pension Committee explained to the Applicant the effect of Administrative Rules J.4 and J.5 on the calculation of his initial US dollar and Spanish local currency benefits. He noted that "as you qualified for the transitional measure in paragraph 37 of the UNJSPF Pension Adjustment System, the Pension Fund had to calculate what your local-currency pension entitlement as of 31 December 1990 would have been, had you retired on that date." He further noted that, in determining eligibility for the 2 and 3 percentage reduction factors, Rule J.5 was applied and the Applicant's contributory service was calculated according to actual years, months and days of service (i.e. 24 years, 11 months and 16 days of contributory service).

On 15 October 1992, the Applicant lodged an appeal with the Standing Committee of the UNJSPB. On 13 August 1993, the Secretary of the UNJSPB advised the Applicant as follows:

> "Please be advised that, at its [175th meeting held on 29-30 June 1993], the Standing Committee decided to uphold the determination made by the Secretary of the Pension Board establishing the initial amount of your periodic benefit under the Fund's Pension Adjustment System. In reaching its decision the Standing Committee took full account of the provision of:
>
> (a) The transitional measure under the UNJSPF Pension Adjustment System, as adopted by the United Nations General Assembly (JSPB/G.12/Rev.2, para. 37);
>
> (b) Article 29(b) of the Fund's Regulations concerning eligibility for the favourable reduction factors for early retirement; and
>
> (c) Rule J.5 in the Pension Fund's Administrative Rules.
>
> A copy of the Fund's Regulations and Rules is enclosed for your information, together with a copy of the UNJSPF Pension Adjustment System. Please note that we are ready to respond to any further questions that you may have in connection with this matter.

We regret that, prior to your separation from UNESCO service, you may have received from the UNESCO Staff Pension Committee estimates of your early retirement benefit from the Pension Fund that apparently had not been calculated correctly. It should be stressed, however, that the estimates provided by UNESCO indicated clearly that they were tentative estimates and that an accurate determination of your entitlements could be made only after your actual separation from service. While we fully agree and appreciate that errors in estimates should be avoided to the maximum possible extent, we must also underscore the fact that erroneous estimates do not create benefit entitlements that would be either higher or lower than those prescribed under the Pension Fund's Regulations and Pension Adjustment System, as adopted by the UN General Assembly."

On 12 May 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent should have applied Administrative Rule J.4 to the calculation of the Applicant's contributory service for the purpose of determining the application of the transitional measure set forth in paragraph 37 of the Pension Adjustment System.

2. The calculation to be made did not involve determining eligibility for a benefit but rather the amount of the benefit, which should be calculated in accordance with Administrative Rule J.5.

Whereas the Respondent's principal contentions are:

1. Administrative Rule J.5, which deals with the calculation of contributory service for the purpose of determining eligibility for a benefit, was the proper rule to apply in determining the application of the transitional measure set forth in paragraph 37 of the Pension Adjustment System.

2. Administrative Rule J.4 is applicable only for the calculation of the amount of a benefit and not for purposes of eligibility.

The Tribunal, having deliberated from 31 October to 21 November 1995, now pronounces the following judgement:

I. The appeal before the Tribunal challenges a decision of the Standing Committee of the UNJSPB sustaining the determination by the Secretary of the UNJSPB of the Applicant's Spanish local currency track pension under the transitional measure set forth in paragraph 37 of the Fund's Pension Adjustment System. Issues relating to that transitional measure have previously been considered by the Tribunal in Judgement No. 589, Shousha (1993), and in other cases cited therein. The present application raises a question not previously considered by the Tribunal. It arises out of a claim by the Applicant, rejected by the Standing Committee, that Administrative Rule J.4 should be applied in determining the Applicant's eligibility for the transitional measure established by the General Assembly in December 1990, with respect to the local currency base amount of his early retirement pension.

II. The Applicant initially retired on 31 December 1990, at the age of 56, with 24 years, 11 months and 16 days of contributory service. The Applicant's separation date of 31 December 1990 was subsequently revised to 18 January 1991. As of his revised separation date, the Applicant had completed 25 years of contributory service. That made him eligible for favourable reduction factors relating to early retirement, as provided in Article 29(b)(i) of the Fund's Regulations, for which he would not have been eligible had his retirement date been 31 December 1990. The change in date thus increased his initial dollar pension. However, the revision of the Applicant's separation date, to 18 January 1991, was determined by the Fund to have no effect on the Applicant's initial local currency benefit under the 1990 transitional measure referred to above. Paragraph 37 of that measure speaks of eligibility for benefits in the following terms:

> "Participants in the Professional and higher categories, who separated from service or died in service between 1 January 1991 and 31 March 1992, and who were age 55 or above on 31 December 1990, shall be entitled to no less than the local currency base amount to which they would have become entitled under paragraphs 35 and 36 above, if they had separated on 31 December 1990, at the age and with the final average remuneration and contributory service attained on that date." (Emphasis added)

III. In short, the General Assembly, contrary to the view expressed in the dissenting opinion, did not fragment the conditions for eligibility, but made a participant's eligibility to the local currency base amount of his pension under the formula prescribed in paragraph 35 of the interim transitional measure, dependent on what his or her situation would have been as of 31 December 1990, inter alia, with respect to contributory service attained on that date.

IV. The Applicant's position, in a nutshell, is that the determination of his contributory service attained on 31 December 1990 should be based on Administrative Rule J.4 of the Fund concerning incomplete months of contributory service. That Rule provides:

> "The contributory service of a participant which is used as a multiple to obtain the rate or amount of any particular benefit shall be calculated in years and fractions of years, each complete calendar month being deemed equal to one twelfth of a year, and the total number of days comprised in the incomplete calendar months being apportioned by the addition of one month for each 30 days or part thereof of 15 days or longer; a residual period of less than 15 days shall be disregarded."

The Applicant's contention is that this Rule should be applied to his situation as of 31 December 1990. Because on that date he had 24 years, 11 months and 16 days of contributory service, that period would be rounded up to 25 years. This would make him eligible for the favourable reduction factors provided for in Article 29(b)(i) of the Fund Regulations, and hence to a more favourable local currency

base amount under paragraph 35 of the interim transitional measure, thus increasing the local currency base amount of his pension.

V. The Respondent's position is that Administrative Rule J.4 has no application to determine eligibility of a participant for a particular benefit. The Respondent argues that an Administrative Rule cannot alter, much less enlarge, eligibility terms expressly provided in a Regulation established by the General Assembly. According to the Respondent, this would be equally true with respect to Article 29(b)(i), and paragraphs 35 and 37 of the transitional measure. In the Respondent's view, if there was need to apply an Administrative Rule in order to determine the Applicant's eligibility under that article or those paragraphs, Administrative Rule J.5 would be the correct rule. That Rule provides:

> "The contributory service of a participant which is used to determine his eligibility for a benefit shall be calculated according to the actual years, months, and days comprised therein; for the purpose of determining his final average remuneration, incomplete months shall be disregarded ..."

The Applicant argues that this Rule is applicable only with respect to the question of whether a participant in the Fund is entitled to a pension. But the language of the Rule is not so limited. It refers to "eligibility for a benefit" (emphasis added). Indeed, the application of Rule J.5 to the Applicant's eligibility for the favourable reduction factors under Article 29(b)(i) to his dollar pension would have prevented him from receiving the benefit of those factors, had he not obtained the revision of his retirement date. Moreover, the Tribunal notes that, in keeping with Article 4(b) of the Regulations, Rule J.5 is entirely consistent with paragraph 37 of the interim transitional measure. The latter contains not the slightest suggestion of any possibility of adjustment, up or down, in "contributory service attained" as of

31 December 1990. Moreover, the Respondent points out that its consistent practice has been to apply Rule J.5 in determining eligibility and, thereafter, to apply Rule J.4 in the calculation of the amount of the benefit for which the participant was found to be eligible. This assertion appears to be undisputed. The Respondent also notes that there would be no need for Rule J.5, if both eligibility and the rounding process in a calculation were determined by Rule J.4. Nevertheless, the Respondent may wish to consider clarifying the language of Rule J.4 so as to eliminate possible future confusion with respect to it.

VI. The Tribunal finds that the issue in this case is governed by the clear and unambiguous language of the General Assembly, reflected in paragraph 37. In the light of that language, and in view of the objective sought to be achieved by the General Assembly in adopting the interim transitional measure for calculation of the local currency base amount, there can be no doubt that it intended eligibility to be dependent on a determination of the final average remuneration and contributory service as of 31 December 1990. (Cf. Judgement No. 589, Shousha (1993)). As to Rules J.4 and J.5, the Tribunal accepts the Respondent's contention that Rule J.5 is the proper rule applicable to this case.

VII. The Applicant has argued that he relied, to his detriment, on an erroneous estimate of his pension benefits, which he received from UNESCO, and which appears to have been based on the latter having shared the Applicant's erroneous interpretation regarding the effect of the Administrative Rules. The Tribunal regrets that the Applicant was misled, but finds no merit in this contention. First, estimates are tentative. That was made clear by a cautionary note he received with the estimate. Second, the amount ultimately received by the Applicant was essentially the amount estimated in 1990 before the 21 December 1990 transitional measure adopted by the

General Assembly. In any case, neither an incorrect estimate nor an erroneous UNESCO interpretation creates an entitlement greater or smaller than the entitlement under the applicable Regulations, Rules, or the Pension Adjustment System.

VIII. The Tribunal realizes, of course, that, had the Applicant known in early 1990, when he decided to retire, what the eventual consequence would be with respect to his local currency track pension under the 21 December 1990 transitional measure, he might have made a different decision with respect to early retirement. But that is not a matter that the Tribunal can deal with. As the Tribunal has previously held, it is not empowered to rewrite existing Regulations or to create new Regulations for the Pension Fund. And, as the Tribunal has also previously noted, interim transitional measures invariably result in some who benefit from them and some who do not. (Cf. Judgement No. 589, Shousha, paragraphs XI-XIII (1993)). Finally, the Tribunal notes that, although the Applicant did not benefit from the interim measure set forth in paragraph 37 of the Pension Adjustment System, he did benefit from the earlier interim adjustment measure that applied to his entitlement.

IX. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
President, presiding

Mikuin Leliel BALANDA
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary

* * *

DISSENTING OPINION BY MR. LUIS DE POSADAS MONTERO

I share the Applicant's view. In my opinion, the benefit to which the Applicant is entitled under paragraph 37 of the interim transitional measure approved by General Assembly resolution 45/242 of 21 December 1990, should be calculated according to Rule J.4.

Paragraph 37 provides that the benefit established by paragraph 35 of the transitional measure shall also be applicable to those staff members retiring between 1 January 1991 and 31 March 1992, under certain conditions. Paragraph 37 sets forth those conditions and provides the method for calculating the benefit established by the transitional measure.

The first part of paragraph 37 deals with the conditions required for eligibility for the benefit, i.e. that the staff member must be in the Professional and higher category, have separated from service between certain dates and be over age 55.

The second part of paragraph 37 deals with the way in which the benefit is to be calculated and provides that it would be "no less than the local currency base amount to which [the staff member] would have become entitled ..., if ([he/she] had separated on 31 December 1990, at the age and with the final average remuneration and contributory service attained on that date."

The level of the final average remuneration and contributory service attained by the staff member on 31 December 1990, referred to in the last sentence of paragraph 37, is not connected with eligibility. The staff member that has met the requirements mentioned in the first part of paragraph 37 is eligible, irrespective of the level of the final remuneration and contributory service attained by 31 December 1990. What remains to be determined, on the basis of the level reached on 31 December 1990, is the way the benefit is to be calculated. In the case of the Applicant, there is no contention as to his eligibility. His right to the benefit under paragraph 37 is not under discussion. The

discussion arises as to whether he should be subject to a 2 per cent reduction or a 6 per cent reduction, a matter clearly connected with the calculation of the amount of the benefit.

Therefore, Rule J.4 should be applied.

For the foregoing reasons, I disagree with the Judgement.

(Signature)

Luis de POSADAS MONTERO
Vice-President

New York, 21 November 1995

R. María VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

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21 November 1995

ORIGINAL: ENGLISH

Judgement No. 731

Case No. 782: RAISSIS-SONNENDRÜCKER

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Leliel Mikuin Balanda;

Whereas, on 7 February 1994, Marie Louise Raissis-Sonnendrücker, a staff member of the United Nations, filed an application requesting the Tribunal:

> "...to rule that I am entitled to compensation at least equal to the net loss which I have incurred and will continue to incur as long as I am employed and as long as I am in receipt of a pension ...
>
> ... [resulting from failure] ... to inform me clearly of the financial disadvantages of my promotion from G-7 to P-2, [on 1 January 1989] ..."

or

> "... to allow me to revert to the G-7, step XI level, ... with retroactive effect to 1 January 1989, ..."

Whereas the Respondent filed his answer on 9 February 1995;

Whereas the Applicant filed written observations on 25 August 1995;

Whereas, on 28 September 1995, the Applicant submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of the International Trade Centre (ITC) on 18 March 1974, as a Research Assistant at the G-6 level, pursuant to a one year fixed-term appointment. She served on a succession of fixed-term appointments until 1 January 1983, when she was granted a permanent appointment. On 1 January 1986, she was promoted to the G-7 level, as Principal Research Assistant. On 1 January 1989, the Applicant was promoted to the P-2, step XI level, as Associate Trade Promotion Officer. On 1 September 1991, she was promoted to the P-3, step VI level, as Trade Promotion Officer.

When the Applicant was promoted from the General Service to the Professional category, she was granted a non-pensionable, Personal Transitional Allowance (PTA) of US$263.30 per month, for an initial period of one year, starting on 1 January 1989. According to the P.5 Personnel Action form implementing her promotion her "Pension Fund remuneration [would] be maintained at G.7/XI MAX [MAXIMUM] until the Pension Fund remun[eration] at Prof[essional] level is equal or higher."

In a letter dated 18 February 1989, the Applicant raised with the Chief, Personnel Administration Section, Division of Administration, several issues relating to the effect on her benefits of her transition from the G-7 to the P-2 level. Noting that she had previously been given an assurance that "a promotion cannot give rise to a loss in remuneration," she asked for an explanation.

In a reply dated 12 July 1989, the Head, Regular Staff Unit, Personnel Administration Section reviewed the issues raised in the Applicant's letter, stating with respect to the PTA:

> "... the sum shown in the P.5 action, i.e. US$263.30 per month, is to adjust your present salary level to that of a G.7 step XI. If, after the initial period of one year, the P.2 salary scale at the step XI level is equal to or more

> than that of a G.7/XI the allowance will cease, if not it will continue until such time as the P.2/XI salary scale matches that of the G.7/XI. I confirm that the PTA is not pensionable."

She confirmed that the Applicant's contribution to the Pension Fund "will continue at the G.7 rate until such time as it matches the contribution in the professional category."

The Applicant's PTA was extended from 1 January 1990 through 30 June 1990, at an increased rate of US$267.39 per month. On 9 July 1990, a P.5 action form was issued to discontinue the Applicant's entitlement to the PTA, with effect from 1 July 1990.

On 11 July 1990, the Applicant wrote to the Executive Director, ITC, contesting the decision to suspend payment of the PTA. She noted that between 1988 and 1990 staff in the General Service category in Geneva had received annual increases corresponding to the cost of living index. In contrast, her salary "has remained the same as it was in December 1988; that is to say that it is now approximately 7% less than it would be if I had remained in the General Service staff." She requested that her situation be reviewed and that the decision to terminate her PTA be rescinded. In a letter to the Director, Division of Administration, dated 30 August 1990, the Applicant again raised these concerns.

On 11 September 1990, the Applicant requested the Secretary-General to review the administrative decision to discontinue her PTA.

On 26 February 1991, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against the decision to discontinue the PTA and against the reduction in her salary and in her pensionable remuneration, following her promotion.

On 1 September 1991, following her promotion to the P-3 level, the Applicant questioned the calculation of her step at the higher grade. In a letter to the Secretary General, dated 28 October 1991, the Applicant noted that had her promotion to the

P.3 level been implemented at step 11, rather than step 6, her resulting salary would have at least equalled the salary she would have received had she remained at the G.7 level. In a reply, dated 21 November 1991, the Director of Personnel Administration and Training informed the Applicant that the Secretary-General did not object to her contesting the modality of the implementation of her P-3 promotion in the context of her appeal relating to her P-2 promotion.

The JAB adopted its report on 5 November 1993. Its considerations, conclusions and recommendations read, in part, as follows:

"Considerations

...

22. The Panel concluded that the staff member had actively sought promotion to the Professional category by a series of applications dating back to 1979 and, in particular, by applying for the P-2 vacancy in ITC advertised as vacancy notice ITC/VN/3 1988. Her case was, therefore, different from that of General Service staff whose posts had been reclassified to the Professional level. Under the circumstances it believed that it was incumbent upon a staff member to familiarize himself/herself with significant differences in the conditions of service between the two categories, particularly the level of emoluments, and that the Appellant's professed ignorance of these differences, was not a justification for her claim that the Organization maintain the compensatory measures or make provision for her to revert to the General Service category.

23. It found it reasonable to conclude therefore that a staff member making such an application had accepted the differences, including those relating to the level of emoluments and decided that there were also other benefits of greater job satisfaction and higher levels of responsibility that a career in the Professional category offered. The Panel, therefore, found no grounds to support the Appellant's claim to revert to the General Service category because of differences in the level of pay, which it considered to be neither in her own personal best interest nor that of the Organization.

Conclusions and Recommendations

24. On the basis of the available evidence and information the Panel concludes that the Appellant has received fair treatment. When selected for promotion to P-2, she was granted, although she had not participated in the competitive examination for promotion to the Professional category, the same advantages as the candidates who had successfully passed the examination. She was granted a Personal Transitional Allowance until such time when her P-2 salary was higher than the previous G-7 payment. Moreover, she was promoted to P-3 two years and eight months after the promotion to P-2.

25. Furthermore, the Panel concludes that the Administration of the International Trade Centre applied, in cooperation with the competent United Nations authorities at Headquarters and in Geneva, the administrative instructions of the United Nations relating to promotions.

26. If, as stated by the Respondent on 31 May 1991, 'the extensive overlapping of salary scales from the General Service into the Professional and higher categories, together with the continuous increase in the General Service salaries, has led to an abnormal situation at certain duty stations, including Geneva', the Panel concludes that this is a legislative and not a judicial question.

27. The Panel makes no recommendation in support of the appeal."

In a letter dated 22 November 1993, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed her that "the Secretary-General has decided to maintain the contested decision and to take no further action in your case."

On 7 February 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant's promotion from the General Service to the Professional category resulted in a financial loss to her.

2. The Applicant was never informed that a promotion could involve a financial loss. On the contrary, she was assured that a promotion could not involve such a loss.

Whereas the Respondent's principal contentions are:

1. The Applicant willingly sought promotion and has no right to revert to the General Service category.

2. The significant differences in conditions of service between the General Service and the Professional category, and their effects in Geneva because of the currency exchange rates, are public knowledge.

3. The PTA ensured that the Applicant's salary was not below what she earned at the General Service level prior to her promotion. Thereafter, her salary changed in accordance with the salary movements of the Professional category.

The Tribunal, having deliberated from 10 October to 21 November 1995, now pronounces the following judgement:

I. The Applicant appeals a decision of the Secretary-General dated 22 November 1993, adopting an adverse recommendation by the Joint Appeals Board (JAB). The Applicant asks that the Tribunal rule that she is entitled to compensation at least equal to the net loss which she allegedly sustained and will continue to incur as a result of her promotion from the General Service to the P-2 level, on 1 January 1989 and then to the P-3 level, on 1 September 1991. Alternatively, the Applicant asks that the Tribunal allow her to revert to the General Service category with effect from 1 January 1989. In essence, the Applicant complains that the grant of a promotion she sought from the General Service to the Professional category has resulted in her remuneration and emoluments being less than they would have been had she remained in the General Service

category. This results primarily from the different methodologies set forth in the Staff Rules governing remuneration and emoluments with respect to each category. The adverse situation described by the Applicant is also to a significant degree the result of fluctuations in the exchange rate between the Swiss franc and the US dollar. In short, there is no specification by the Applicant of any failure to apply to her properly any particular staff rule. There is no claim of any non-observance of the terms of her appointment. Her general complaint is that she should have been better off following her promotion than she was before.

II. When the Applicant's case was before the JAB, its primary focus, as viewed by the JAB, related to the discontinuance, with effect from 1 July 1990, of a Personal Transitional Allowance (PTA) which had previously been paid to the Applicant. This resulted from an interpretation made by the Administration of paragraph 17 of ST/AI/279 of 20 January 1981, to the Applicant's advantage. The PTA was designed to ensure that the Applicant's salary in the Professional category was at least equal to that of her level and step in the General Service category at the time of her promotion. The PTA was to cease permanently once her Professional category salary equalled or exceeded the final salary she had received while in the General Service category. Changes made in General Service salaries, subsequent to her promotion, could not affect her salary. The Applicant had been made aware of the manner in which the PTA would operate long before it was discontinued. In the appeal before the Tribunal, the Applicant does not pursue any issue relating to the PTA. In any event, there is no showing that the discontinuance of the Applicant's PTA with effect from 1 July 1990 was in conflict with the applicable rules. Although, as noted above, the JAB's attention was mainly directed at the issue relating to the PTA, it also dealt with the Applicant's claim to revert to the General Service category.

III. The Tribunal notes that, contrary to the contention of the Applicant, it was not the responsibility of the Organization to inform her of possible future disadvantages relating, in part, to differences in salary movements between different categories that might be associated with her promotion from the General Service to the Professional category. She sought the promotion and must be presumed to have been acquainted with the salary provisions of the Staff Rules applicable to the Professional category. The Tribunal also notes, as did the JAB, that, for a period of time, the Applicant received especially favourable treatment as her pensionable remuneration was based on her former General Service salary instead of her Professional category salary, with corresponding higher contributions to the Pension Fund by the Organization.

IV. This case involves a sought-for promotion obtained by the Applicant rather than a reclassification of her post from the General Service to the Professional category. Nevertheless, the Applicant's claim to revert to the General Service category raises essentially the same question that was decided by the Tribunal in Judgement No. 629, Clavel and Sallier (1993). For the reasons set forth in paragraphs VII and VIII of that Judgement, there is no merit in the Applicant's position. (See also ILOAT Judgement No. 1322, In re Anderson (1994)). The Tribunal agrees with the unanimous view of the JAB that the problems described by the Applicant raise legislative, not judicial, issues, and, therefore, are not within the competence of the Tribunal, which is limited to claims of non-observance of a staff member's contract of employment, including applicable Rules and Regulations. Here, the Applicant has not identified any such non-observance.

V. The Applicant also invites the Tribunal's attention to similar matters relating to a subsequent promotion she received from

the P-2 to the P-3 level. The JAB found that the applicable Administrative Instructions relating to promotions had been applied properly. Indeed, the Applicant had been promoted to the P-3 level after only two years and eight months following her promotion to the P-2 level. The Tribunal finds no reason to disagree with the JAB's conclusion regarding the latter promotion. The Applicant also attempts to raise some issues which were not considered by the JAB. These are not properly before the Tribunal.

VI. The Tribunal notes with dismay the difficulties encountered by the Applicant, which she has brought to the attention of the Tribunal, in connection with her efforts to obtain assignment of counsel by the Office of the Coordinator of the Panel of Counsel. The Tribunal trusts that this Office will be more responsive in the future to requests for assistance from applicants.

VII. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Mikuin Leliel BALANDA
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
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Administrative Tribunal

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AT/DEC/732
21 November 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 732

Case No. 802: AKKAWI

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 10 July 1994, Hassan Ahmed Akkawi, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, hereinafter referred to as UNRWA, filed an application requesting the Tribunal, inter alia:

> "a. [To rescind] the contested decision ...
>
> b [To reinstate] the Applicant to his post under whatever title it existed, and considering the period of cessation as a period of special leave with full pay.
>
> c. [To compensate him] for the moral and material injury, with US$100,000, should Respondent not reinstate [him].
>
> d. [To pay] counselling fees and secretarial expenses estimated at US$3,000."

Whereas the Respondent filed his answer on 30 December 1994;

Whereas the Applicant filed written observations on 21 April 1995;

Whereas, on 29 October 1995, the Applicant submitted an additional statement;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 20 November 1980, as a Civil Engineer in Lebanon, on a fixed-term appointment at grade 14. His appointment was extended repeatedly, and he was granted an indefinite appointment, with effect from 1 January 1985. On 1 January 1992, the Applicant's post was reclassified as Deputy Field Technical Officer, at grade 16, and the Applicant was appointed to the reclassified post and promoted. On 1 December 1992, the post of Deputy Field Technical Officer was abolished. On 16 December 1992, the Applicant separated from service.

In a memorandum to the Comptroller, dated 3 November 1992, the Director of UNRWA Affairs, Lebanon (the Field Director), proposed, in the context of a reorganization of the office, that the post of Deputy Field Technical Officer be abolished, noting that "there are no major construction works in hand". In a reply dated 9 November 1992, the Comptroller and the Officer-in-Charge, Department of Personnel, jointly agreed to the abolition of the post. On 14 November 1992, the Field Personnel Officer informed the Applicant that a decision had been taken to eliminate the post of Deputy Field Technical Officer with effect from 1 December 1992 and that as a consequence, the Applicant was "hereby declared redundant." As an alternative to redundancy, he offered the Applicant the post of Area Officer, Beqa'a, grade 12, with grade protection at grade 14. He advised the Applicant that this post was the only suitable vacant post and that if he did not accept it, he would be separated on redundancy with effect from 9 December 1992.

In a memorandum to the Field Director, dated 11 December 1992, the Applicant contested the decision to abolish his post, which he asserted was a reflection of "sheer prejudice" undertaken "not because it is not needed any more, but just in order to get rid

of its incumbent." He protested the offer of an alternative post in Beqa'a. He requested that the decision to eliminate the post be rescinded and that he be considered on special leave with full pay until a favourable decision was taken. In a reply dated 12 December 1992, the Field Director stated "your post was eliminated like a whole range of other posts," in accordance with the Area Staff Regulations and Rules. He urged the Applicant to take the alternative post offered to him, noting that otherwise he would be separated under the redundancy rules.

In a letter dated 16 December 1992, the Field Director noted that the Applicant, on that day, had officially informed him of his rejection of the alternative post offered to him in Beqa'a. The Field Director informed the Applicant that in the circumstances, his service with the Agency would be "terminated on redundancy under Area Staff Rule 109.1 effective from close of business on 16 December 1992."

On 17 December 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 5 May 1994. Its recommendation reads as follows:

> "21. In view of the foregoing, the Board unanimously recommends that the Appellant's case be reviewed with a view to reinstating the Appellant in a post commensurate with his qualifications, experience and previous remuneration, and that the period between the date of termination of the Appellant's services on redundancy and that of his reinstatement be considered special leave with full pay under the provisions of Area Staff Rule 105.2 and Personnel Directive A/5/Rev.1(1.4.9)."

On 1 June 1994, the Commissioner General transmitted a copy of the JAB report to the Applicant and informed him as follows:

> "You will note that the Board acknowledged that it is the prerogative of the Administration to eliminate a particular post, thereby placing the incumbent in a position of provisional redundancy, provided that affected staff members are dealt with within the framework of provisions

stipulated on redundancy, particularly the applicable Personnel Directive. The Board then noted what they considered the short notice of redundancy given to you, and expressed the view that the offered post of Area Officer, Beqa'a, was not a suitable post within the meaning of the Directive. The Board recommended that your case be reviewed with a view to reinstating you in a post commensurate with your qualifications, experience and previous remuneration, and that the period between the date of termination of your services on redundancy and that of your reinstatement be considered special leave with pay.

I have given your case the most careful and thorough consideration. Having done so, I cannot agree with the Board that the post of Area Officer, Beqa'a, to which you were offered transfer with grade and salary protection, was not a suitable post within the meaning of the Personnel Directive. I fail to see how you would have been disadvantaged by accepting transfer to this important position, and this is the criterion to be applied under the applicable subparagraph of the Directive. In any case, even if the offered post had not been suitable, the Administration's obligation would have been only to pay a termination indemnity. In this regard, you were offered financial compensation by the Director of Administration and Human Resources which exceeded the requirements of the Directive. In my view, this was a fair offer, and had you accepted it, your situation would have been no worse, and even slightly better than, any other staff member whose post had been eliminated and was therefore declared redundant."

On 10 July 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to terminate the Applicant's service was motivated by prejudice. The claim that it was motivated by redundancy is false as the Respondent did not eliminate the Applicant's post until eight months after termination of the Applicant's service and the post was re-established three months after its elimination.

2. The Respondent contravened his rules regarding redundancy.

Whereas the Respondent's principal contentions are:

1. The Respondent's decision was proper and in accord with its rules. There was a sound managerial basis for the elimination of the Applicant's post, and the Applicant was offered a suitable alternative post.

2. There is no evidence that the Respondent's decision was motivated by personal prejudice or bias.

The Tribunal, having deliberated from 10 October to 21 November 1995, now pronounces the following judgement:

I. The Applicant's reaction to the abolition of his post was that the decision was based on prejudice and extraneous factors and was designed to get rid of him. He also contends that the action did not accord with the relevant rules and regulations; that the need for the post had not ended; that the proposed transfer would not have been to a post in the same or a similar group, because the Applicant is an Engineer and not an Administrator; that there would have been loss of salary and that he did not receive the required three months notice.

The Applicant further claims that the abolition took place at a time when he was involved in a major work expansion and when more posts were being filled in Lebanon, including posts such as Principal T.C. Siblin and that of maintenance engineer. Furthermore, the Applicant notes that his post had been reclassified approximately a year before, the implication being that it should not have been necessary to abolish it such a short time later.

II. While the Tribunal notes the points made by the Applicant, it fails to find any evidence that the decision was prompted by prejudice and by a wish to get rid of the Applicant for base reasons.

The Respondent's reasons for abolishing the post have been examined by the Tribunal. The Tribunal will not enter into the merits of the reasons for the abolition. It examines the reasons proffered only to discover whether the case put forward by the Respondent could be said to be perverse in the circumstances.

The Respondent says that there was a sound managerial basis for the abolition and lists the factors that were taken into account. There were no major construction works planned for 1993; the 1993 planned construction was of a routine nature or was to be carried out by consultants; there were three engineers in the Field Technical Office other than the Applicant and in the light of the type of construction planned in 1993, the Applicant's post would be unnecessary. The savings from the proposed reorganization were necessary for other programmes.

The Respondent further makes the point that the circumstances which forced the abolition of the post could not have been foreseen when it was established only a year before. In relation to the new post of Assistant Field Technical Officer, this occurred some twelve months later, when circumstances were different and different skills and qualifications were needed.

The Tribunal concludes that, whatever the merits of these reasons on managerial and efficiency grounds are, they do not suggest a basis for prejudice.

III. The Applicant was unhappy with the offer of the alternative post. The Respondent says that, in offering the post, he was fulfilling his obligations.

Area Staff Personnel Directive A/9, paragraph 14, provides that when a staff member's post has been abolished, he or she is declared provisionally redundant. During the period of provisional redundancy efforts should be made to locate a "suitable post" to which a staff member could be transferred. "Suitable post" includes posts of the same occupation and grade; posts of lower grade or with

a lower salary to which the staff member agrees to be transferred, and any other post which, in the opinion of the Commissioner-General and having regard to all the circumstances, including the views of the staff member, is not to his or her disadvantage.

In cases of transfers to posts which are more than two grades lower than that previously held by a staff member, he or she shall "have his/her salary protected at a grade which is two grades higher than the post to be occupied, and at the incremental step that most closely approximates that applicable in his/her previous grade, provided that the new step does not exceed the maximum incremental step for the new grade".

The Applicant was offered a post which was not of the same occupation. It was significantly lower in grade but the Respondent has dealt with this by offering the required grade protection.

IV. The Tribunal is concerned that the Respondent, in determining that the post offered to the Applicant was a suitable post, did not take sufficient, or indeed any cognizance of the requirements of paragraph 14.6.3 of the Staff Personnel Directive, which places an obligation on the Commissioner-General to have regard to the views of the staff member. It is only if the Commissioner-General takes all the relevant factors into account that it can be said that a suitable post was properly offered. This does not appear to have occurred. It does not necessarily follow, however, that the post offered to the Applicant was in fact unsuitable, particularly if no alternative post was available. The Respondent's failure to consider the Applicant's views was a procedural shortcoming.

The Respondent, in failing to give the required three months notice to the Applicant, did not observe another important procedural requirement. The Applicant was entitled to a strict adherence to the rules and he should not have been told that he was to lose his post within such a short time.

V. In the light of the foregoing procedural irregularities, the Tribunal orders the Respondent:

(i) To pay to the Applicant six months of his net base salary, at the rate in effect at the time of his separation from service.

(ii) To give the Applicant priority consideration for any post for which he applies and for which he is qualified.

VI. The Tribunal makes no further order, and rejects all other pleas, including the Applicant's request for costs.

(Signatures)

Samar SEN
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/733
21 November 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 733

Case No. 794: DE GARIS

Against: The Secretary General of the International Civil Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Francis Spain; Mr. Mayer Gabay;

Whereas, on 18 April 1994, R.M. De Garis, a former staff member of the International Civil Aviation Organization, hereinafter referred to as ICAO, filed an application requesting the Tribunal, inter alia:

"...

IV. [To] determine that I was erroneously dismissed under FSSR [Field Service Staff Rule] 2.4(e) (...) and that my files both in Montreal and in Saudi Arabia be purged of any implications of unsatisfactory conduct.

V. [To] rule that the Secretary General of ICAO overstepped his authority ... and in so doing did cause damage to my own reputation and career aspirations.

VI. [To order]:

1. Payment of salary and benefits for the balance of my one year contract;
2. Payment of an indemnity equal to one week's salary for each month of uncompleted service under the contract;

3. Payment of noliday pay and benefits;
4. Damage for breach of contract, emotional stress, economic loss and loss of reputation in an amount equivalent to one year's salary, including all benefits;
5. Such further and other relief that the Tribunal may deem just.

..."

Whereas the Respondent filed his answer on 31 October 1994;

Whereas the Applicant filed written observations on 7 December 1994;

Whereas the facts in the case are as follows:

On 24 December 1991, the Applicant signed a contract with ICAO for a period of twelve months "to perform for or on behalf of the Government [of Saudi Arabia] as Air Traffic Controller, Operational Assistance (OPAS), in Riyadh, Saudi Arabia." On 14 January 1992, the Applicant entered the service of ICAO.

In a memorandum dated 3 April 1992, the Chief, Field Personnel Section (FPS), advised the ICAO Technical Cooperation Project Manager in Jedda, Saudi Arabia (ICAO/TCMSA), that the Applicant's probationary period would expire on 13 July 1992, and that under Rule 2.4 of the Field Service Staff Rules (FSSR), appointments may be terminated by one month's notice or salary in lieu thereof. He requested a recommendation as to whether the probationary period should be considered as satisfactorily completed or whether the staff member should be terminated. He noted that the recommendation "should be substantiated by one full written appraisal of the staff member's service by his immediate supervisor."

In a cable dated 4 May 1992, the Project Manager indicated that the Applicant's performance had been "found not satisfactory". He attached an assessment made by the Presidency of Civil Aviation of Saudi Arabia, and signed by the Director General of Air Traffic

Services, co-signed by the Project Manager, ICAO/TCMSA, recommending discontinuation of the Applicant's services. The assessment described relationships with counterparts and associates, attendance and reliability, and overall performance as unsatisfactory.

In a memorandum dated 7 May 1992, the Director, Technical Cooperation Bureau, informed the Secretary General that the Applicant's performance had been found unsatisfactory. He noted that "it is not the first case of termination of Air Traffic Controllers' contracts in Riyadh for reasons of inability to cope with the density of traffic..." He recommended that the Secretary General approve the termination of the Applicant's contract, in accordance with Article IV, paragraph 3, of his OPAS contract "and for reasons of unsatisfactory performance during his probationary period".

The Secretary General replied on 8 May 1992, directing that the Applicant should be invited to resign with the understanding that if he did not, his contract would be terminated. On 13 May 1992, the Project Manager advised the Director, Technical Cooperation Bureau, that the Applicant preferred the option of resignation. However, before exercising the option, "he requests a written assurance that he will retain benefits available if he had not taken the option."

In a memorandum dated 16 May 1992, the Project Manager confirmed in writing to the Applicant that (1) the Applicant's service on probation had been found not satisfactory; (2) the Secretary General would decide to terminate his contract, under FSSR Rule 2.4(e), and he would be provided with air tickets and shipment of his household goods; and (3) the Secretary General would have no objection if the Applicant proposed to resign before his contract was terminated. With regard to the Applicant's query, he noted that normally, following resignation, a staff member would not be entitled to payment of travel and removal expenses, but that in his case, the Secretary General would be willing to authorize such

payment on an exceptional basis. Finally, he stated that the Applicant would not be entitled to payment of a termination indemnity, whether he resigned or his contract was terminated.

On 22 May 1992, the Director, Technical Cooperation Bureau, advised the Secretary General that the Applicant had refused to resign. On 25 May 1992, the Secretary General approved the termination of the Applicant's contract. In a letter to the Project Manager, dated 24 May 1992, the Applicant stated that his performance had not been unsatisfactory and that his contract was being terminated for budgetary reasons. He further stated "I effectively have no choice and hereby tender my resignation to be effective as of July 11, 1992. Accrued earned statutory and national holiday credits are to be taken prior to this date." Finally, the Applicant commented: "I assumed that ... I would only be terminated if my performance was genuinely found wanting, and not simply for budgetary convenience. At the very least ... I would have expected to have been terminated under paragraph 9.4C and D as redundant ..."

On 26 May 1992, the Chief, FPS, informed the Project Manager that the Applicant's case had been submitted to the Secretary General for termination "as resignation letter [was] not received on time." In a further telex on the same date, the Chief, FPS, advised the Project Manager that the Secretary General had approved the termination of the Applicant's contract. On 28 May 1992, the Project Manager informed the Applicant accordingly. He noted that his resignation had been received after approval of the termination, and that it was not acceptable because it did not provide one month's notice.

On 31 May 1992, the Applicant informed the Secretary General that he was filing an appeal against his dismissal, which he stated "was undertaken for reasons other than performance". In a reply dated 22 June 1992, the Director, Technical Cooperation Bureau, informed the Applicant that the Secretary General had decided "not

[to] review his decision." On 30 June 1992, the Applicant separated from service. On the same date, he lodged an appeal with the Advisory Joint Appeals Board (AJAB). On 21 February 1994, the AJAB adopted its report. Its conclusions read as follows:

> "127. Having considered the merits of this case, the Board unanimously concludes that:
>
> (a) The provisions of the FSSR and FOM [Field Operations Manual] in relation to termination generally and more specifically during the probationary period are applicable to this case.
>
> (b) The decision of the Secretary-General to terminate the Appellant's contract under FSSR Rule 2.4(e) was improperly arrived at and was not in accordance with the relevant provision of the FSSR, the FOM and due process of law.
>
> (c) The Organization, due to circumstances beyond its control, had no option but to terminate the Appellant's contract.
>
> 128. It is the opinion of the Board that under the circumstances the Organization should have terminated the Appellant's contract on the basis of article IV.4 of the contract or FSSR Rule 9.4(d). In the light of the foregoing the Board recommends unanimously that the Appellant be paid termination indemnities in accordance with Rule 9.7(b) of the FSSR.
>
> 129. The Board also recommends that the Appellant be compensated for the days of accrued annual leave which were included in his 30-day notice period.
>
> 130. Furthermore in view of the damage done to the reputation of the Appellant and moral injury caused to him, the Board recommends that the Secretary General pay the Appellant damages of US dollars 5,000.
>
> 131. It is also the opinion of the Board that there is no documentary evidence as to the professional incompetence of the Appellant. The Board further recommends that a copy of this Opinion be placed on the Appellant's personnel files both at Headquarters and in Saudi Arabia. The Board also recommends that a letter be sent to the Appellant stating that his dismissal from his post as Air Traffic Controller in

Riyadh was for reasons beyond the control of the Organization and in no way detracts from his professional qualifications and ability.

132. The Board makes no other recommendations in this case."

On 18 March 1994, the Secretary General informed the Applicant that he was "unable to accept the conclusions and recommendations of the Board in this case."

On 18 April 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision to terminate the Applicant's appointment constituted non-observance of his contract of employment and the ICAO FSSR.

2. The termination of his employment was carried out for reasons of expediency at the expense of the Applicant's reputation.

Whereas the Respondent's principal contentions are:

1. The decision to terminate the Applicant's contract did not constitute an abuse of power.

2. The Applicant's conditions of employment were governed by his contract and he was therefore responsible only to the Saudi Government.

The Tribunal, having deliberated from 2 to 21 November 1995, now pronounces the following judgement:

I. By contract between the International Civil Aviation Organization (ICAO) and the Applicant, he was appointed to the post of Air Traffic Controller in Riyadh, Saudi Arabia. The contract provided inter alia:

"Article IV

...

3. The Officer shall be on probation for six months following the commencement of the appointment. ...

If during the period of probation, the Organization is not satisfied with the services of the Officer, the Contract may be terminated by one month's notice in writing or by salary in lieu thereof. The decision of the Organization in this respect shall be final.

4. This Contract may be terminated by either party upon one month of written notice. Should the Organization so terminate the Contract, it shall pay to the Officer an indemnity equal to one week's salary for each month of uncompleted service under this Contract, subject to a minimum of six weeks and a maximum of three months.

However, no indemnity shall be due if the termination of the Contract is based ... on the unsatisfactory service of the Officer during the probation period."

In addition, an annex to the contract stipulated that:

"1. In accordance with Article II, paragraph 6 of the Contract, benefits mentioned in Article II are to be provided by the Organization under terms, conditions and definitions generally the same as those applicable to its staff members in the category of field service staff. The ICAO Field Service Staff Rules govern the conditions of service applicable to field service staff employed under the various ICAO projects of Technical Co-operation. ...

2. Benefits under Article II will therefore, in general, be those described in the booklet entitled 'ICAO Field Service Staff Rules'. ..."

II. Further, by letter dated 23 October 1991, a Personnel Officer sent the Applicant a copy of the ICAO Field Service Staff Rules (FSSR) with the following advice:

"... Please read the rules carefully: they establish the benefits to which you are entitled during the period of your service ..."

The Applicant commenced his appointment in Riyadh on 14 January 1992.

III. On 3 April 1992, the Chief, Field Personnel Section (FPS), sent a memorandum to the Project Manager in Jeddah, Saudi Arabia, indicating that the Applicant's probationary period expired on 13 July 1992 and that a recommendation was required to determine his future contractual status. The recommendation had to be "substantiated by one full written appraisal of the staff member's service by his immediate supervisor." On 4 May 1992, the Project Manager replied, submitting an appraisal signed by the Director General of Air Traffic Services of Saudi Arabia, and not by the Applicant's immediate supervisor, that the Applicant's performance had been found not to be satisfactory.

IV. On 7 May 1992, the Director, Technical Cooperation Bureau, ICAO, wrote to the Secretary General recommending his approval of the termination of the Applicant's appointment.

The letter also made reference to provisions in the Applicant's contract, as well as ICAO statutory provisions, including FSSR Rule 9.4 and Rule 2.4(e), regarding termination.

V. On 26 May 1992, the Chief, FPS, informed the Project Manager in Jeddah that the Secretary General had approved termination of the Applicant's contract for reasons of unsatisfactory service, in accordance with article IV, paragraph 3 and that FSSR Rule 2.4(e) - Probation and FSSR Rule 9.7(f) - Indemnities on Termination, applied in his case. The Applicant was informed of the termination on 28 May 1992.

The Applicant appealed this decision. The ICAO Advisory Joint Appeals Board (AJAB) concluded that the Secretary General's decision "was improperly arrived at and was not in accordance with the relevant provision of the FSSR, the FOM and due process of law".

It recommended payment to the Applicant of a termination indemnity in accordance with FSSR Rule 9.7(b), and compensation for the days of accrued annual leave included in his 30-day notice period. The Secretary General rejected the AJAB's recommendation.

VI. The Applicant asks for (i) payment of salary, benefits, and holiday pay for the balance of his one year contract; (ii) an indemnity equal to one week's salary for each month of uncompleted service; and (iii) damages for breach of contract, economic loss and emotional distress. He also requests that adverse material be expunged from his record.

The Respondent argues that the FSSR and the FOM do not apply to Air Traffic Controller, Operational Assistance (OPAS) personnel since they are not staff members. Consequently, they do not apply to the Applicant's contract.

Having reviewed the material, the Tribunal notes that several references to the FSSR and the FOM were made by the Respondent throughout the Applicant's term of service. The memorandum of 3 April 1992 was based upon the Probationary Report Form found in Chapter 16 of the FOM. It was sent by the Chief, FPS, to the Project Manager, and it made reference to FSSR Rule 2.4, as governing the probationary period, noting that the Applicant's probationary period was due to expire. In addition, the Respondent made reference to the FSSR when he terminated the Applicant's contract. The Project Manager informed the Applicant that FSSR Rule 2.4(e), on termination due to unsatisfactory performance during probation, and FSSR Rule 9.7(f), on the application of indemnities to termination under FSSR Rule 2.4(e), applied to his case.

VII. Based on the above, the Tribunal finds that the Respondent's contention that the rules and procedures in the FSSR and the FOM do not apply to OPAS personnel is unfounded. In fact, as noted above,

it was the Respondent himself who made numerous references to them and applied them when suitable. If these rules were inapplicable, this should have been made clear to the Applicant.

VIII. The Organization used the form found in Chapter 16 of the FOM to assess the Applicant's performance. This required that any recommendation be confirmed by a full written appraisal by the employee's immediate supervisor. In the Applicant's case, the appraisal submitted was not, as required by the form, written by his immediate supervisor, nor was it confirmed by him. The Tribunal held in Judgement No. 272, Chatelain (1981), paragraphs II and III that:

> "II. ... the decision to terminate the Applicant's appointment on the basis of adverse reports cannot stand if it is shown that
>
> (a) the Administration has not complied with the relevant procedures laid down in the ICAO Service Code and in the ICAO General Secretariat Instructions (GSI); or that
>
> (b) the Applicant's appointment has not been terminated in accordance with due process of law.
>
> III. Even if the Tribunal accepts the Respondent's argument that the Applicant was still on probation at the time of her termination, the Secretary General's decision, in the Tribunal's view, cannot be final if it has been improperly arrived at."

IX. The Tribunal agrees with the Applicant's submission that a parallel exists between his case and that of Chatelain. In both cases, the procedures followed to terminate the Applicant's contract did not comply with the relevant provisions of the FSSR and ICAO did not follow the procedures required by the FOM. In addition, in the present case, the Organization did not make any effort to obtain information to support or to challenge the allegations made in the report. It is a fundamental principle of law that a person has the right to be heard and given an opportunity to respond to allegations

against him or her. In failing to provide for this right, the Respondent did not provide the due process of law to which the Applicant was entitled.

X. The Respondent claims that in terminating the Applicant's contract, he was simply respecting the wishes of the Government of Saudi Arabia. During his oral submissions to the AJAB, as well as in the written submission before the Tribunal, the Respondent states that the Applicant was responsible to the Government of Saudi Arabia and that it was the host country that took the decision to terminate the Applicant's contract. The Tribunal recognizes that this decision was beyond the Respondent's control. Nevertheless, the implementation of this decision was within the control of the Respondent. He elected to terminate the contract pursuant to article IV, paragraph 3, rather than under article IV, paragraph 4. The Respondent may have been compelled to terminate the Applicant's contract, but he was not compelled to do so under article IV, paragraph 3, which relates to unsatisfactory performance. He could and should have applied article IV, paragraph 4 of the contract or FSSR Rule 9.4(d).

XI. For the foregoing reasons, the Tribunal finds that:

1. The termination of the Applicant's contract under article IV, paragraph 3 of his contract was improper. The Respondent should have applied article IV, paragraph 4, which provides for an indemnity equivalent to one week's salary for each month of uncompleted service subject to a minimum of six weeks and a maximum of three months. The Applicant is entitled to this indemnity.

2. The Applicant is entitled also to compensation for the unfair treatment to which he was subjected. The Tribunal assesses this compensation at an amount equal to three months of his net base salary at the date of his separation from service.

XII. Accordingly, the Tribunal orders the Respondent:

1. To pay to the Applicant a termination indemnity equivalent to one week's salary for each month of uncompleted service subject to a minimum of six weeks and a maximum of three months;

2. To pay to the Applicant compensation in the amount of three months of his net base salary at the date of his separation from service; and

3. To remove from the Applicant's personnel file all adverse material relating to his performance.

XIII. All other pleas are rejected.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Francis SPAIN
Member

Mayer GABAY
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/734
21 November 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 734

Case No. 787: ISLAM

Against: The United Nations Joint Staff Pension Board

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, on 30 April 1994, Md. Matiul Islam, a former staff member of the United Nations Industrial Development Organization, hereinafter referred to as UNIDO, filed an application requesting the Tribunal:

> "To rescind the decision of the Standing Committee [of the United Nations Joint Staff Pension Board] that the Applicant's review petition was time-barred and direct the Committee to consider the review petition on its merits."

Whereas the Respondent filed his answer on 30 March 1995;

Whereas the Applicant filed written observations on 28 April 1995;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 3 January 1982, as a staff member of UNIDO. He separated from UNIDO on 30 June 1987. He opted for an early retirement benefit which commenced to be paid, with effect from 1 August 1987.

The Applicant re-entered the service of the United Nations on 13 September 1987, as a staff member of the United Nations Development Programme (UNDP), and again became a participant in the United Nations Joint Staff Pension Fund (the Pension Fund) as of that date. On the same date, the Pension Fund suspended payment of his early retirement benefit. The Applicant served in UNDP until 31 December 1990. With effect from 1 January 1991, the Applicant re-entered the service of UNIDO, until 28 February 1993, when he retired.

In a letter dated 18 May 1988, the Applicant sought advice from the Secretary of the UN Joint Staff Pension Board (UNJSPB) as to whether he could cover the break in his service from 1 July to 12 September 1987, for pension purposes. In a reply, dated 14 July 1988, the Secretary of the UNJSPB advised the Applicant, "there is no provision in the Pension Fund Regulations and Rules which would enable you to contribute for a period while not in the employ of a member organization of the Fund." The Secretary further advised the Applicant that his two periods of service could not be linked "because, although you re-joined the Fund within one year after your separation you were paid a benefit and your contributory service was not less than five years."

In a facsimile dated 4 January 1993, to the Secretary of the UNJSPB, the Applicant recalled the exchange of correspondence in 1988, regarding his request to link his two periods of service, and noted "I did not take up the matter so long as I did not have time, due to extreme pre-occupation of my assignment, to study the pension rules in depth. Now that my retirement is due on 28 February 1993, I am taking up the matter again for a review." The Applicant noted that his separation was less than twelve months, as required, and that he had been disqualified as a result of having been paid one month's pension prior to resuming service. He appealed to the UN

Joint Staff Pension Committee to condone the "minor technical violation" of the rules "by allowing [him] to refund ... the benefit drawn with full interest to revert to the position of status quo ante."

In a further facsimile dated 15 January 1993, the Applicant requested that his case be reviewed by the Standing Committee of the UNJSPB or that he be advised of an appropriate alternative forum for his appeal. In a reply dated 25 January 1993, the Secretary of the UNJSPB advised the Applicant "Neither the Standing Committee of the Pension Board, nor any other entity, has the discretion to authorize the determination and payment of benefits from the Pension Fund other than in strict conformity with its statutory Regulations and Rules."

In a letter dated 15 February 1993, the Applicant submitted an appeal to the Standing Committee, requesting authorization for an exception or an amendment of the rules to delete the condition that no benefit has been received, as a result of prior service, before the resumption of contributory service.

In a letter dated 30 September 1993, the Secretary of the UNJSPB informed the Applicant as follows:

> "At its 175th meeting, held on 29 and 30 June 1993, the Standing Committee noted that, after your re-entry into Fund participation on 13 September 1987, you had soon inquired about the possible applicability of article 21(b) so as to link your periods of UNJSPF contributory service. However, after receiving a negative response from the Secretary of the Board in July 1988, you waited until January 1993 to challenge the Secretary's decision. For that reason the Standing Committee concluded that your request for review was time-barred and therefore was not receivable. It may be added that, in accordance with Rule K.5 in the Fund's Administrative Rules, any request for review should normally be submitted 'within 90 days of receipt of notification of the disputed decision.'"

On 30 April 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The Applicant's letter of 18 May 1988 was an inquiry, and the response was a clarification and not a decision. His request dates to his letter of 4 January 1993, and the reply of 25 January 1993 was the decision made on the request. His appeal is therefore not time-barred.

Whereas the Respondent's principal contention is:

The Respondent's reply of 14 July 1988 to the Applicant's request of 18 May 1988, regarding his pension rights, was a decision which the Applicant attempted to re-open in his request of 4 January 1993. His appeal is therefore time-barred.

The Tribunal, having deliberated from 30 October to 21 November 1995, now pronounces the following judgement:

I. The Applicant requests the Tribunal to overturn the decision of the Standing Committee of the UN Joint Staff Pension Board (UNJSPB), communicated to him on 30 September 1993, whereby his request for linking his two periods of service was denied, on the ground that it was time-barred. The view of the Committee was that the Applicant's claim had already been rejected by the Secretary of the UNJSPB on 14 July 1988, in response to the Applicant's letter of 18 May 1988, and that the Applicant requested review only in January 1993. This request was, therefore, time-barred.

II. The Applicant contends that he had never submitted any claim in 1988. His letter of 18 May 1988 to the Secretary of the UNJSPB

was aimed at obtaining advice and could not have led to any administrative decision. The Applicant's view is that his formal claim was only submitted on 4 January 1993 and rejected by the Secretary of the UNJSPB on January 25th. This decision was appealed by the Applicant on 15 February and, on 25 February, the Applicant was informed by the Secretariat of the Pension Fund that his appeal would be considered by the Standing Committee, on the basis of his letters of 4 January and 15 February.

III. In considering this appeal, the Standing Committee concluded that there had been a previous administrative decision on the matter in 1988 and that the Applicant had failed to challenge it, thus forfeiting his rights to do so in respect of the subsequent decision by the Secretary of the UNJSPB of 25 January 1993.

The Applicant has limited his claim in the present instance to the specific point of whether the Standing Committee acted correctly when deciding that his claim was time-barred.

Therefore, this will be the only issue that the Tribunal shall consider. The Tribunal shall not consider the merits of the case in this instance.

IV. The crucial point to be decided by the Tribunal is whether the 14 July 1988 reply from the Secretary of the UNJSPB is an administrative decision that should have been timely appealed by the Applicant in order to protect his rights.

In this respect, the Tribunal observes that the wording of the Applicant's letter of 18 May 1988 clearly shows that, at the time, the Applicant was only seeking advice from the Pension Fund and not a decision. Thus the second paragraph of the letter says: "I am taking this opportunity to seek your advice ...", and the third paragraph reads: "I would like to get your advice ..."

The Secretary of the UNJSPB replied to this request for advice on 14 July 1988 in a negative way. This reply was viewed by the Standing Committee, in January 1993, as a negative answer to a formal request.

V. The Tribunal does not share this view. It is the opinion of the Tribunal that the Applicant acted reasonably when considering that the Respondent's reply of 14 July 1988 was of the same nature as his request. There was no reason for the Applicant to suppose that the Respondent's reply went beyond his request for advice and constituted an administrative decision that would require him to appeal within the statutory time limits. It is also the opinion of the Tribunal that, inasmuch as the 14 July 1988 reply from the Pension Fund gives rise to doubt as to whether it constitutes an administrative decision, it should not be used to reject an appeal on the grounds of timeliness.

VI. For the above mentioned reasons, the Tribunal finds that the Applicant's failure to institute a recourse procedure against the Pension Fund, pursuant to the Pension Fund's reply to his 18 May letter, has not impaired his right to appeal against any subsequent decision on the matter.

Therefore, the Tribunal rules that the appeal submitted by the Applicant on 15 February 1993, against the decision of the Secretary of the UNJSPB dated 25 January 1993, is not time-barred and should be considered by the UNJSPB on its merits.

VII. For the foregoing reasons, the Tribunal remands the case to the UNJSPB for consideration on the merits.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary